State of New York
Court of Appeals

Summaries of cases before the Court of Appeals are prepared by the Public Information Office for background purposes only. The summaries are based on briefs filed with the Court. For further information contact Gary Spencer at 518-455-7711 or gspencer@nycourts.gov.

To be argued Wednesday, January 6, 2021 (arguments begin at 2 pm)

No. 5 Matter of Juarez v New York State Office of Victim Services

Michelle Soriano and Daniel Velez are crime victims who applied for and received compensation awards from the State Office of Victim Services (OVS) in 2016. However, the agency declined to make any award of attorneys' fees for the law firm that represented them in the application process. Soriano, Velez and other petitioners brought this lawsuit against OVS to challenge amended regulations it adopted in January 2016 to limit awards for attorneys' fees to legal costs incurred during "administrative review for reconsideration" of an OVS decision or during "judicial review of the final decision." Prior to the amendments, the regulations provided that claimants had a "right to be represented ... at all stages of a claim" and that OVS "shall approve a reasonable fee commensurate with the services rendered, up to $1,000." The petitioners argued that, in limiting fee awards to administrative appeals and judicial review, OVS exceeded its authority under Executive Law article 22, which created the agency and authorized it to provide financial assistance to crime victims. More specifically, they argued the amended regulations conflict with Executive Law § 626(1), which requires OVS to reimburse crime victims for "out-of-pocket loss" due to unreimbursed medical care and other expenses. The statute says such expenses "shall also include ... the cost of reasonable attorneys' fees for representation before [OVS] and/or before the appellate division upon judicial review not to exceed one thousand dollars."

Supreme Court found OVS did not exceed its authority under article 22, saying "OVS's broad authority to adopt rules governing the approval of attorney's fees for representation before the agency, together with the agency's duty to award only reasonable reimbursement to crime victims, provides a sufficient statutory predicate for excluding attorneys' fees incurred in the preparation and submission of claims...." Holding the amended regulations were not arbitrary or irrational, it said "OVS reasonably could determine that it was an unnecessary use of the limited State funds available for the compensation of crime victims to provide reimbursement to private attorneys for providing essentially the same services made available to claimants at no cost through the State-funded" Victim Assistance Programs (VAPs).

The Appellate Division, Third Department reversed and annulled the amended regulations, finding they conflict with the mandate of section 626(1). It said "we find no authorization in the statute's plain language for OVS to conclude that counsel fees are *never* 'reasonable' during the early stages of a claim and, thus, to categorically exclude awards of counsel fees for such representation in *every* instance." The statute "uses broad, mandatory language in providing that out-of-pocket loss 'shall' include reasonable counsel fees for 'representation,' with no qualifications or limitations other than the $1,000 ceiling." While OVS's funding of VAPs "has likely resulted in significant benefits to many victims," it said, "OVS's internal decisions on how to allocate its resources for assisting victims in preparing claims cannot countermand the statutory language that requires it to include reasonable counsel fees in awards for out-of-pocket loss...."

For appellant OVS: Assistant Solicitor General Owen Demuth (518) 776-2053
For respondents Juarez et al: George F. Carpinello, Albany (518) 434-0600

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To be argued Wednesday, January 6, 2021 (arguments begin at 2 pm)

No. 6 Greene v Esplanade Venture Partnership

Susan Frierson and her two-year-old granddaughter, Greta Devere Greene, were on a walk on Manhattan's Upper West Side in May 2015 when debris fell from the facade of a commercial building and struck them both. The child suffered fatal head injuries and Frierson suffered knee and ankle injuries. Frierson and Greene's estate brought this action for negligence and wrongful death against the building's owner, Esplanade Venture Partnership; a contractor, Blue Prints Engineering, P.C.; and Maqsood Faruqi, an engineer employed by Blue Prints. Nine months later, the plaintiffs moved for permission to add a cause of action for negligent infliction of emotional distress on behalf of Frierson, saying Frierson was "within the 'zone of danger'" when she witnessed the accident that killed her granddaughter and "sustained a severe shock" and "severe mental anguish as a result." The defendants opposed the motion, arguing that Frierson and Greene were not "immediate family" members as required for such a claim under Bovsun v Sanperi (61 NY2d 219 [1984]). In a footnote in Bovsun, the Court of Appeals said "we need not now decide where lie the outer limits of 'the immediate family,'" and it has not since addressed the question of whether a grandparent and grandchild would qualify.

Supreme Court granted the motion to add a claim for negligent infliction of emotional distress. It said Frierson "provided information about her relationship with her Granddaughter which may lead a court or jury to determine that [Frierson was an] immediate family member, which is required to prevail in a third-party claim for negligent infliction of emotional distress. While the cases on this issue in New York have been few, there are cases where third-parties with close familial-like relationship[s] to the negligence victim[s] have prevailed...."

The Appellate Division, Second Department reversed in a 3-2 decision, holding that Frierson and her granddaughter were not immediate family members. It cited Trombetta v Conkling (82 NY2d 549 [1993]), in which the Court of Appeals, in holding that a niece could not recover damages for negligent infliction of emotional distress for witnessing the death of her aunt, said, "On firm public policy grounds, we are persuaded that we should not expand the cause of action for emotional injuries to all bystanders who may be able to demonstrate a blood relationship coupled with significant emotional attachment or the equivalent of an intimate, immediate familial bond." The majority ultimately relied on the Second Department's 2005 decision in Jun Chi Guan v Tuscan Dairy Farms (24 AD3d 725), which declined to expand the meaning of "immediate family" to include grandparent and grandchild "absent further direction from the Court of Appeals or the New York State Legislature."

The dissenters argued that "the 'immediate family' requirement should be replaced by a more functional approach that focuses on the nature of the relationship between the bystander and the injured third party. Such an approach will recognize the legitimacy of non-traditional family structures and evolving social practices. A bystander should be entitled to recover if they establish that they are a 'close family member' of the injured third party.... The use of consanguinity as a crude proxy for emotional harm is to sanction the arbitrary and unjust results that will inevitably follow...."

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For respondent Esplanade Venture: Jonathan P. Shaub, Manhattan (212) 599-8200
For respondents Blue Prints and Faruqi: Katherine Herr Solomon, Woodbury (516) 487-5800

State of New York
Court of Appeals

To be argued Wednesday, January 6, 2021 (arguments begin at 2 pm)

No. 7 People v Frederic Badji

Frederic Badji was charged with fourth-degree grand larceny and related crimes for allegedly going on a shopping spree in the spring of 2015 using three credit cards stolen from his supervisor at the headquarters of the Success Academy charter school system in lower Manhattan. Among other things, Badji was accused of charging $677.60 to his supervisor's MasterCard at a Verizon store for a new iPhone and two-year service contract in Badji's name. The prosecution presented no evidence that he had physical possession of the stolen MasterCard, but did provide still images from surveillance video at the Verizon store showing Badji purchasing items at the time of the transaction on his supervisor's MasterCard. It also presented evidence that he used two of his supervisor's American Express cards to purchase more than $1,000 worth of clothing and shoes at other Manhattan retail stores.

At trial, Badji moved to dismiss the grand larceny count that was based on the theft of the MasterCard, arguing proof he possessed the credit card itself, not just the card number, was required for conviction under Penal Law § 155.30. Supreme Court denied the motion, relying on the Appellate Division, First Department decision in People v Barden (117 AD3d 216 [2014]), which said "the Legislature intended intangibles, including credit card numbers, to fall within the ambit" of stolen property. The court later instructed the jury that, for a charge alleging theft of property under section 155.30, "Property means a credit card ... or any number assigned to a credit card...." Badji was convicted of three counts of fourth-degree grand larceny, possession of stolen property and attempted grand larceny, and was sentenced to six months in jail.

The Appellate Division, First Department affirmed. Citing its prior ruling in Barden, it said Badji's "challenge to the sufficiency of his larceny conviction based on his theft of the victim's [MasterCard] is unavailing, notwithstanding the absence of proof that defendant was in possession of the physical credit card when he used intangible credit card information to make purchases." The court also rejected Badji's challenges to the trial court's evidentiary rulings as either unpreserved or harmless error.

Badji argues the evidence is insufficient to support his conviction for theft of the MasterCard without proof that he had physical possession of the card itself. He cites the Second Department's decision in Matter of Luis C. (124 AD3d 109 [2014]), which expressly declined to follow Barden and instead held that a defendant's possession of a stolen debit card number, without proof he possessed the actual card, was not sufficient to support conviction under the grand larceny and possession of stolen property statutes. He also argues that "the trial court's multiple erroneous evidentiary rulings violated [his] due process right to a fair trial."

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For respondent: Manhattan Assistant District Attorney Michael J. Yetter (212) 335-9000